

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

NANCY KEENAN

\* \* \* \* \*

ON THE MATTER OF	)	
Esiquio Hernandez,	)	OSPI 165-89
	)	
Appellant,	)	
	)	
vs.	)	DECISION AND ORDER
	)	
HAVRE SCHOOL DISTRICT 16A,	)	
	)	
Respondent.	)	

\* \* \* \* \*

STATEMENT OF THE CASE

This matter is an appeal before the Superintendent of Public Instruction pursuant to Section 20-10-132, MCA, from the Findings of Fact, Conclusions of Law and Order of the Hill County Transportation Committee dated December 27, 1988. The appeal of the decision of the Havre School District 16A Board of Trustees was heard and evidence presented on September 12, 1988.

The issue before the Hill County Transportation Committee was the entitlement to payment for individual transportation for the 1987-88 school year. It is undisputed that Appellant qualifies for an individual transportation contract.

On January 19, 1989, an appeal was filed with this Superintendent. The complete record, including the dissenting opinion of committee members Shirley Isbell and Beverly Peterson, and the briefs filed, having been reviewed, this Superintendent

now makes the following decision:

#### DECISION AND ORDER

The State Superintendent of Public Instruction has jurisdiction of this appeal in accordance with Section 20-10-132, MCA. The standard of review in an appeal of a decision of a county transportation committee is set forth in 10.6.125, ARM

This Superintendent finds that the substantial rights of the appellant have been prejudiced because the findings of fact, conclusions of law and order are affected by error of law and are in part clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. This matter is remanded to the Hill County Transportation Committee to issue an order in accordance with this decision.

#### MEMORANDUM OPINION

The statutes pertinent to this decision are Sections 20-10-121, MCA, and 20-10-124, MCA, which state *in paria materia*:

20-10-121 (2) The tendering of a contract to the parent or guardian whereby the district would pay the parent or guardian for individually transporting the pupil or pupils shall fulfill the district's obligation to furnish transportation for an eligible transportee. (emphasis added)

20-10-124 (2) Any school bus transportation by a private party or individual transportation that is furnished by a district shall be under contract, and no district, county,

1 or state money shall be paid for such transportation services  
2 to any person or firm who does not hold a legal contract with  
3 the district. Transportation contracts for the ensuing year  
4 shall be completed by the fourth Monday of June....

5 The provisions of Section 20-10-121, MCA, clearly require that  
6 the district tender a contract to eligible individuals. As this  
7 Superintendent has previously held, the word tender requires a  
8 direct and positive action. Harlem School District #12 vs Wallace  
9 and Loretta Beck, et al, OSPI 164-89. Black's Law Dictionary (5th  
10 Edition) defines "tender" as the act by which one produces and  
11 offers a person holding a claim or demand against him satisfaction  
12 of that claim or demand. The essential characteristics of tender  
13 are an unconditional offer to perform coupled with manifested  
14 ability to carry out the offer and production of the subject  
15 matter of "tender".

16 Finding of Fact No. 9 states that District 16A placed a  
17 notice in the paper and had a public service announcement read by  
18 a local radio station regarding the availability of individual  
19 transportation contracts. However, the record does not support  
20 this finding. Appellant stated that he was "informed that a  
21 notice had been placed in the newspaper and the radio sometime  
22 back in June of '86." (Transcript Page 3) Mr. Matter, chairman  
23 of the board, testified that a "press release" such as  
24 Respondent's Exhibit A is normally honored when they are received  
25 by the radio stations. The record does not contain any testimony

1 or exhibit of any actual news article or radio announcement.

2 If in fact the purported news release was published, it does  
3 nothing more than provide information that someone "may" be  
4 eligible and that contracts will be available. The law requires  
5 a tender of a contract for individual transportation. To require  
6 individuals having a right to transportation contracts to "somehow  
7 find out" (Transcript page 34) about the availability is not  
8 compliance with the law.

9 Section 20-10-124, MCA, provides that no payment of any  
10 district, county, or state money for transportation services will  
11 be made except under a legal contract with the district which is  
12 to be completed by the fourth Monday in June. The reason a  
13 contract was not completed by the fourth Monday in June was the  
14 District's failure to tender a contract to Appellant. The  
15 District's failure to comply with 20-10-121(2) cannot form the  
16 basis for relieving the District of its obligations to provide  
17 transportation for eligible transportees residing with Appellant.  
18 It would be unreasonable to impose on Appellant a timeline of  
19 which he was not made aware by the district--a timeline whose  
20 purpose is to allow a school district to properly budget for  
21 necessary transportation expenditures.

22 DATED this 23 day of October, 1989.

23 Nancy Keenan  
24 NANCY KEENAN  
25

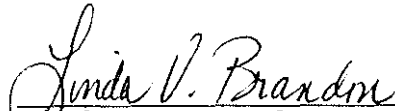
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 24<sup>th</sup> day of October, 1989, a true and exact copy of the foregoing Decision and Order was mailed, postage prepaid, to:

Esiquio Hernandez  
510 Bullhook Dr. SE  
Havre, MT 59501

Shirley Isbell  
Hill County Superintendent  
300 4th Street  
Havre, MT 59501

Richard Floren  
425 6th Street  
Havre, MT 59501

  
Linda V. Brandon  
Paralegal Assistant  
Office of Public Instruction